No. 85-705

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

EMERSON MOLT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

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Petitioner contends that the government was barred from introducing statements falling within the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E), because it did not first establish that the declarants were unavailable to testify at trial.

After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of conspiring to import marijuana and cocaine, in violation 21 U.S.C. 963, and of conspiring to possess those drugs with intent to distribute them, in violation of 21 U.S.C. 846. He was sentenced to concurrent eight-year terms of imprisonment on each count and a fine of $25,000. The court of appeals affirmed (Pet. App. 1a-9a).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 2a). It showed that petitioner was a participant in a drug smuggling enterprise headed by Ronald Markowski, Frank Brady, and perhaps one other person. Brady owned land in Florida, which the smugglers used as a meeting place, and on Cat Island, Bahamas, which they used as a stopover on trips from Colombia. The normal course of operation was for Markowski or one of his partners or employees to fly marijuana or cocaine from Colombia to an airstrip in the Bahamas. The smugglers would either immediately take the drugs by air to Florida or Georgia or store them in the Bahamas for later trips. Petitioner's role was as coordinator on the ground in the Bahamas, where he made sure that planes could land safely, refueled them, unloaded drugs, and reprovisioned other smugglers. He also took to the air as a "cover" pilot, looking out for surveillance and potential interference on the ground. On one occasion, he helped rescue a stranded smuggler.

2. The case against petitioner consisted principally of the testimony of five of his co-conspirators. As part of their testimony, these witnesses recounted many conversations among other co-conspirators. These statements were admitted under the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). Petitioner contends that the introduction of these statements violated the Confrontation Clause because the government did not show that the declarants were unavailable to testify at trial. The issue whether the Confrontation Clause bars the prosecution from introducing statements falling within the co-conspirator rule unless it establishes the declarant's unavailability to testify at trial is currently before the Court in

United States v. *Inadi*, No. 84-1580 (argued Dec. 3, 1985). Accordingly, the instant petition should be held pending the decision in *Inadi* and disposed of as appropriate in light of that decision.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DECEMBER 1985

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